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SOCIAL MEDIA: CYBER TRAP DOOR TO DEFAMATION - JAMAICA'S DEFAMATION ACT 2013 EXAMINED

by

COLEEN B. LEWIS*

Social media is increasing being used by persons worldwide. The nature and characteristics of social media serve to advance the exercise of the human right to freedom of expression. This article argues that while these qualities of social media has its positives, it also conversely exacerbate the risk of social media users being culpable for claims of defamation worldwide.

The recently enacted Jamaican Defamation Act 2013 includes provisions which are applicable to publications via social media. This article will review those.

KEY WORDS

Social Media, Online Defamation, Freedom of Expression, Jamaican Defamation Act, Internet

1. INTRODUCTION

Happy Birthday Facebook!!! Recently the online social networking application Facebook celebrated its 10 year anniversary.¹ In January 2014, Facebook boasted a registration of more than 1.2 billion active users, making it the most popular social media and networking website.² In the United Kingdom, approximately 98 percent of persons between 18 and 24 years are reported to actively use social media.³ In Jamaica, 46.5 percent of

* coleen.lewis02@uwimona.edu.jm, lecturer at the Faculty of Law at the University of the West Indies, Mona Campus, Jamaica and a PhD Research Candidate at the Faculty of Law, University of Leicester, Leicester

¹ Zuckerberg, M. 2014, *Today is Facebook's 10th anniversary.* <https://www.facebook.com/zuck/posts/10101250930776491> [Accessed May 11, 2015]

² Facebook 2014, <http://newsroom.fb.com/company-info/> [Accessed May 11, 2015]

the population has access to the Internet from their home.⁴ These figures are demonstrative of the popularity of the use of social media worldwide and of how popular, it is also likely to be within the Commonwealth Caribbean. This popularity of social media is largely attributable to the global, multi-jurisdictional and accessible nature and characteristics of the Internet and by extension social media.

This article will first examine how the global and multi-jurisdictional and accessible nature and characteristics of social media serve to advance the exercise of the right to freedom of speech generally. It will then go on to review how these same characteristics of social media, conversely, may exacerbate the exposure of the social media user to likely culpability for the exercise of their human right of freedom of expression in a wrongful manner. These characteristics lull the social media user into complacency to make and or dissemination via social media defamatory statements regarding another person. Finally and specifically, the article will examine the provisions of the recently enacted Jamaican Defamation Act 2013 which are applicable to defamatory publication via internet and by extension, social media.

2. FREEDOM OF EXPRESSION AND ITS SIGNIFICANCE

Freedom of expression has long been established and universally recognised to be one of the most important fundamental right of every individual within every democratic society. Jamaica, like every Commonwealth Caribbean country, has a constitution which includes the guarantee of the right to freedom of expression. The Jamaican Charter of Rights, as included in its Constitution:⁵

guarantees ... the right to freedom of expression; the right to seek, receive, distribute or disseminate information, opinions and ideas through any media...

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and

³ Nielson 2012, *State Of The Media - The Social Media Report 2012* http://cn.nielson.com/documents/Nielson-Social-Media-Report_FINAL_090911.pdf [Accessed May 11, 2015]

⁴ Internet World Statistics 2010, <http://www.internetworldstats.com/car/jm.htm> [Accessed May 11, 2015]

⁵ The Charter of Rights of Jamaica ss13 (3)(c) and (d)

information without interference, and freedom from interference with his correspondence and other means of communication.

These provisions are in line with similar provisions guaranteeing the same right in a number of international human rights instruments. Article 19 (2) of the International Covenant on Civil and Political Rights, 1966 provides:

Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Similarly Article 19 of the Universal Declaration of Human Rights states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The 1978 American Convention on Human Rights also provides:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.⁶

Very similarly, Article 10 of European Convention on Human Rights provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

From these various international human rights instruments, the importance of freedom of expression is clear. The provisions also disclose that the right to freedom of expression not only involves the sharing and imparting information or ideas, but also includes the right to seek and receive information. There is a plethora of legal treatise on the importance

⁶ The American Convention on Human Rights, 9 I.L.M. 673 (1970) (Nov. 22, 1969), Article 13 <http://www.umn.edu/humanrts/oasinstr/zoas3con.htm>. [Accessed May 11, 2015]

of this constitutionally guaranteed right to freedom of expression. The exercise of this right has been agreed to be integral to, and the central of any democratic society. Alexander Meiklejohn, free-speech advocate in the USA, expressed that “democracy” means self-government by an informed electorate.⁷ He explained that in order for them to be so informed and for democracy to function effectively the information and ideas should be allowed to flow freely without constraints.⁸

The importance of this right to freedom of expression was also elaborated on by Lord Steyn in the UK House of Lord’s case of *R v. Home secretary ex. p Simms*.⁹ According to him, free expression:

*“Firstly... promotes the self fulfilment of individuals in society. Secondly...the best test of truth is the power of the thought to get itself accepted in the competition of the market... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”*¹⁰

The importance of freedom of expression therefore cannot be overstated. Self-fulfilment, democracy, and good governance depend on it.

3. SOCIAL MEDIA ADVANCES FREEDOM OF EXPRESSION

Traditional mediums of communication, such as print, television, radio previously were the main outlets for expression prior to the advent of the Internet and social media. Social media has radically impacted the manner in which persons are able to express and share ideas, disseminate information, and interact socially. It is very much an integral part of the way the Internet is used to communicate in modern society. As the use of social media increases, traditional media and methods of communications has been relegated as mediums of choice to exercise one’s freedom of expression.

⁷ Meiklejohn, A. *Free Speech and Its Relation to Self-Government* (New York, NY: Harper, 1948).

⁸ *Ibid.*

⁹ *R v. Home secretary ex. p Simms* [2000] AC 115 at p 126

¹⁰ *Ibid.*

While social media is similar to other traditional mediums of expression and communication, it is possessed of qualities which make it unique from those other communication platforms. Social media is a platform comprising of “a group of internet-based applications ... that allow the creation and exchange of user-generated content.”¹¹ It is the convergence of the technology, applications, qualities and capabilities of the traditional telecommunications mediums.¹² It is this convergence that makes social media unique.

3.1 AFFORDABLE ACCESS

Social media as a platform for greater exercise of freedom of expression is facilitated by the low, and in some instances, no cost to access to the Internet.¹³ According to the International Telecommunications Union reports as at 2013 there were over 2.7 billion people using the Internet. This amounts to just below 40% of the population of the world.¹⁴ The report indicates that 41 percent of households have internet connectivity and 78 percent of these connected households are in the developed world.¹⁵ With social media, the average Jane is able to communicate opinions and ideas and to an even greater audience via social media than traditional telecommunication mediums. It has therefore become common place for persons across the world to access and share content with ease and instantaneously via social media. This capability was once restricted to those publishers who had the financial resources to do so. No longer is expression, whether journalistic, literary or otherwise, restricted to those who are trained formally in journalism or to those who work within mainstream traditional media or in publishing houses. Now this access is available to a wider number of social media users with or without any special skill or training and thereby facilitates greater public discussions and debate occurring among an infinite number of persons.

¹¹ Kaplan, A., Haenlein, M., (2010) *Users of the world, unite! The challenges and opportunities of Social Media*, Business Horizons, Volume 53, Issue 1, Pages 59–68

¹² Ibid.

¹³ International Telecommunications Union (2013), http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/InformationTechnologyPublic&ReportFormat=HTML4.0&RP_intYear=2012&RP_intLanguageID=1&RP_bitLiveData=False. [Accessed June 30, 2013]

¹⁴ Ibid.

¹⁵ Ibid.

3.2 “THERE’S AN APP FOR THAT!”

Another characteristic which contribute to social media being a platform which advances the exercise of one’s freedom of speech is the number and accessibility to a variety of internet applications. These applications¹⁶ were especially invented to allow users to be able to create and exchange their own content via social media, generally at no cost. Content of various formats may be created, shared and received by the social media user via electronic mail, by establishing their own webpage or website, through chat rooms or forums, blogs and vlogs.¹⁷

3.3 MORE GIVE AND TAKE

It is clear from the constitutional provisions as well as the international human rights instruments, that part and parcel of the enjoyment of this constitutionally guaranteed right to freedom of expression is not only the sharing of information but also the ability to access and receive information. Richard Moon, describing the value of expression, explained that “through communicating with others an individual gives shape to his or her ideas and aspirations, [and] becomes capable of reflection and evaluation, and gains greater understanding of her/himself and the world.”¹⁸ It is also against this background it can be asserted that social media is a platform which advances exercise of one’s fundamental right to freedom of speech. The social media user is able to upload and share information easily and quickly, they can also receive content from sources worldwide with ease and speed. These unique nature and characteristics of social media allow and facilitate communication with others and the sharing and shaping of ideas.

3.4 AFFORDABLE TECHNOLOGY

Contributing to the large scale use of social media as a platform for exercising ones right of freedom of expression is the wide scale availability of inexpensive handheld internet accessible mobile devices. These make it possible to access and share social media content easier and faster.

¹⁶ Among the most popular social media applications and websites are Facebook, Twitter, Instagram, LinkedIn, and YouTube (Haenlein 2010), Pages 59–68.

¹⁷ Nielson 2012, *State Of The Media - The Social Media Report 2012* http://cn.nielsen.com/documents/Nielsen-Social-Media-Report_FINAL_090911.pdf [Accessed May 11, 2015]

¹⁸ Moon, R.. (2009) *The Social Character Of Freedom Of Expression*, The Amsterdam Law Forum, Vo1.2, pg 45

Innovations such as the tablet, the iPod, the mobile telephone, the television and more recently the phablet increasing come pre-formatted with Internet accessibility, and social media applications. Consequently, as quickly as a thought or an idea comes to mind, the social media user is able to use his mobile internet accessible device to share those thoughts publicly. Statistics show that 189 million social media users in the United Kingdom utilise handheld devices to access the social website, Facebook as opposed to through the use of a laptop or desktop computer.¹⁹ Therefore the previously limiting barriers of inability to afford to purchase a desktop computer or laptop to access the internet and social media have been lessened or removed. It is now affordable to the average man and as such a wider cross section of the global population are able to access the internet and to interact via social media.

3.5 TIME AND SPACE

Another significant characteristic of social media which serves to advance the ability to exercise ones freedom of expression right, is that its users are un-tethered by time and place. Wherever the user is located in the world, participants via social media may able to access or share information and at any time of the day convenient to them. They are also able to share information to large audiences from various corners of the globe, without the previously limiting factors of geographic distances and borders, or time of day. Social media is trans-jurisdictional in nature.

3.6 THE NEW LIVING ROOM: WHAT AND HOW DO THEY COMMUNICATE?

The unique nature and characteristics of social media also create a sense of comfort which is similar to being in one's own living room, but in a cyber world. The users feel comfortable in engaging in casual expressions. Expressions by its users via social media are often off the cuff, spontaneous, and at times very emotive. Regard for grammar and spelling is not the focus of the sharing. Additionally, social media is used to vent their frustrations as well as to partake in and share the latest gossip. Reliable and unreliable information is shared with equal exuberance. Speech is unfiltered. Social media users may engage in measured and well thought-out discourse in cyberspace. Social media users may also use this additional platform to

¹⁹ Ibid.

scrutinize and comment on governance by public officials. This relaxed approach to publication of content via social media user in part is further caused by the users' ability to receive and share information and ideas anonymously. Users may also opt to communicate using a pseudonym. By so doing, social media has created a cloak which results in social media users being less hesitant to share content which is controversial, unpopular or defamatory.

3.7 FREEDOM OF EXPRESSION - NOT AN ABSOLUTE RIGHT

The same legislative instruments by which freedom of expression is guaranteed also include provisions which prescribe the limits to this exercise of freedom of expression and for the protection of other rights. One right against which freedom of expression must be balanced is that of reputation. According to the Jamaican constitution:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) which is reasonably required ... for the purpose of protecting the reputation ...”

Similarly, the other international instruments include provisions which express the same limitation to the exercise of freedom of expression.. For example, Article 17 of the International Covenant of Civil and Political Rights provides that:

- 1. No one shall be subject to...unlawful attacks on his honour and reputation.*
- 2. Everyone has a right to the protection of the law against such interference or attacks.*

Additionally, according to Article 19(3) restrictions are imposed on the exercise of freedom of expression on the following grounds:

- (a) For respect of the rights of reputations of others*

(b) For protection of national security, or public order, or public health or morals.²⁰

What is clear from these provisions is that the right to freedom of expression is a restricted qualified one. Freedom of expression is not absolute.²¹ It must be exercised without violating or infringing certain other protected rights and interests. In the Canadian Supreme Court case of *Hill v Church of Scientology of Toronto* (1995)²² Cory J explained that:

*“...The publication of defamatory comments constitutes an invasion of the individual’s personal privacy and is an affront to that person’s dignity. The protection of a person’s reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.”*²³

4. SOCIAL MEDIA – A CYBER TRAP DOOR TO MULTIJURISDICTIONAL DEFAMATION?

While the nature and characteristics of social media empowers users to engage in free expression easily, cheaply, quickly and to a wider audience, with great power comes great responsibility. Flowing alongside the benefits of social media as a platform for freedom of expression is the responsibility to exercise this fundamental right within the limits prescribed by law. However the manner in which social media is being used however suggests that its users are either unaware or do not appreciate that, even in this cyberspace environment, freedom of expression must be exercised within the parameters prescribed by law. Some commentators have likened the use of social media to the ‘Wild Wild West’, free from rules which regulate discourse in the non-cyber world.²⁴ The ability to express oneself without disclosing one’s identity, whether by posting content anonymously or

²⁰ Article 10 of the European Convention on Human Rights also provides. “...the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others...” The American Convention on Human Rights states that...”the exercise of the right provided for in the foregoing paragraph ... shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure... respect for the rights or reputations of others...”.

²¹ Per Lord Steyn in *Secretary of State for the Home Department, Ex Parte Simms* Secretary of State for the Home Department, Ex Parte O’Brien [2000] 2 AC 115

²² 126 DLR (4d) 129, para 120 and 121.

²³ *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4d) 129, para 120 and 121.

under a fictitious name, also contributes to a sense of being untouchable and uncensored, and unaccountable for expressions made via social media.

Social media is about sharing information with, and receiving information from others, and therefore there has been and continue to be occasions where that information shared is defamatory of another person. Any expression to a third party of content which may tend to “lower someone in the “estimation of right thinking members of society generally’ or ‘expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or financial credit”²⁵ will be considered defamatory and may give the aggrieved party a right to bring a claim for defamation against the author of the statement and or anyone involved in the dissemination of the defamatory communication.²⁶

It is the cyber nature of social media which also encourages and facilitates users to take a casual approach to expression, and sharing receiving large amounts of content without a sense of unrestraint. The ease with which a user may re-publish a statement by sharing and re-tweeting, broadcasting is equally easy to do. Within a short period of time content shared via social media may become viral. Consequently, reputation may be harmed with minimal effort via the social media. It is not difficult therefore for a social media user to become a defendant in a claim of defamation. Users of social media may find themselves faced with claims of defamation in relation to statements made in jest, spontaneously with little thought or intent to defame or even anonymously. Given its global reach the potential for harm in relation to defamatory information being published on social media is even greater. The same characteristics of the social media platform which enhance the value of and promote freedom of expression cause social media users to be exposed to a heightened risk that their expressions may cause them to end up defendants to a various actions for their defamatory publications in various different jurisdictions. It is as though the social media has a cyber trap door and users who choose to dance close to this trap door, without due caution, are at an increased risk of falling through by infringing other persons’ rights.

²⁴ *B & T Magazine* (2013) *Cannes: ‘Never apologise’ on ‘Wild West’ social media say celebs* [Online] 16 June 2013 Available from: <http://www.bandt.com.au/news/advertising/cannes-never-apologise-on-wild-west-social-media-s> [Access: May11, 2015]

²⁵ *Sim v. Stretch*, [1936] 2 All E.R. 1237, 1240 per Lord Atkin.

²⁶ Milmo, P and Rogers, W. V. H.(1998) *Gatley on Libel and Slander*, 9th ed. London: Sweet & Maxwell, Para: 1.3

Further, there is no harmonised and internationally agreed law governing the tort of defamation globally. Words and images may have different meanings for different people in different cultures. What is considered acceptable and permissible expression under the laws of one jurisdiction may be considered defamatory and offensive in another. By which laws would an expression via social media be assessed to determine whether it is defamatory? What would be the applicable law which is applied? In the Australian High Court case of *Dow Jones & Company Inc v Gutnick*²⁷ defamatory content was uploaded onto a website from USA. This content was accessed and was downloaded in Australia. The defamed, Gutnick, brought an action against the Dow Jones in an Australian court. The court had to decide in which jurisdiction the publication of defamatory content occurred in order to determine the appropriate jurisdiction in which a defamation action may be initiated by Gutnick. The Court held that the place of publication of was where the defamatory content was accessed and Gutnick's reputation was attacked. The matter was able to be adjudicated in Australia and according to the law of the jurisdiction. An important point which may be gleaned from this case is that social media users may be faced with the possibility of claims being initiated in many or any jurisdiction where the defamed person has a reputation and the defamatory matter published via social media has been accessed.

Users of the social media platform therefore may find their expressions being subject to a variety of nations' standard of defamation laws, some of which may ascribe criminal liability for publication of defamatory content. As a consequence this causes uncertainty in being able to determine by which law the expressions will be eventually adjudged, the limitation period for claims to be brought in relation to the publication of defamatory content via social media and the likely penalty. Users of social media may also be unaware of who may legitimately bring a claim, what defences are available in jurisdiction other than that of the author or re-publisher of the expression. While there may be defences which bear the same name, they may be required to be established in a different manner. Similarly, uncertainty may arise as to how damages will be assessed from jurisdiction to jurisdiction or will different factors be taken into consideration? In fact,

²⁷ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

who is charged with the task of assessing culpability or determine the quantum of damages during a trial?

Social media users may also take heed that they may be found to have published defamatory content where they simply republish links to defamatory publications and encourage others to access the publication, rebroadcasts or 'retweets' the defamatory matter. Under the strict liability common law rule, any person, who, by their voluntary conduct played a role in the dissemination of the defamatory matter to a third party may be also culpable for such publication. Therefore, in the event that the social media user creates, shares and reposts, or forwards defamatory content, he will be strictly liable for its publication. The social media users will therefore need to be cautious and slow to republish content received via social media, including hyperlinks which links to site that might contain defamatory imputations concerning the aggrieved.

Authors of a defamatory content which is subsequently shared by other social media users need to be also concerned with the extent to which they may be found liable for any increased harm caused by virtue of that content being re-shared and re-tweeted or re-broadcasted by other users. The social media is further exposed where the defamatory content posted on the Internet to be archived by the host and as such is capable of being accessible multiple times, and even years after the initial publication. The question to be answered is what is the period within which an action may be brought against the social media publisher of these defamatory contents in archives? Will they be liable for any multiple publications?

5. SOCIAL MEDIA AND THE NEW DEFAMATION ACT OF JAMAICA 2013

An examination of the recently enacted Defamation Act 2013 discloses a number of provisions which may be of direct relevance to publication of defamatory content on social media as its users use it as a viable platform for the exercise of freedom of expression. It answers some of the issues raised by the global trans-jurisdictional nature of social media. Some provisions may provide "comfort" to social media users, while others may cause them concern. Some may serve to ameliorate the extent to which cross and multi-jurisdictional claims may arise from the publication of defamatory content via social media.

Firstly, social media users should be pleased to know that the new legislation has abolished all forms of criminal defamation.²⁸ Consequently, social media users are able to exercise their constitutional right to freedom of expression without the fear of attracting liability for criminal libel in Jamaica.

Section 8 of the Act will also assist in providing some relief to the social media user. It provides that an aggrieved person will only have a single cause of action in relation to a single defamatory statement irrespective of the number of defamatory allegations published within that defamatory statement. This is known as the Single Publication rule. It is also of particular significance for those occasions where an author's defamatory statement is "re-tweeted", shared, re-broadcasted or forwarded to others by other social media users. This will serve to restrict the number of actions brought against the author of the defamatory material in relation to these multiple re-publications which are easily made by other users via the social media.

The Single Publication rule must also be read within the context of the new limitation period for bringing an action under the new Act. The limitation period for instituting an action for defamation has been reduced from 6 years from the date of publication to within 2 years from the date upon which the defamatory statement was first published on the internet, or the date upon which it was first capable of being viewed or listened to through the internet whichever is later.²⁹ With the possibility of republication more a reality in the case of social media content, the user would be relieved that limitation period runs from the first publication and not each subsequent re-publication. As was the case pre- amendment of the Act however, the court retains the discretion to extend the limitation period.

Furthermore the Act provides that, except with the Court's leave, where an aggrieved claimant has already brought an action elsewhere, for example, in another jurisdiction, in respect of the publication of a defamatory matter, the claimant is not allowed to bring proceedings for damages in Jamaica in relation to the same publication. The social media user therefore will not be faced with an action in Jamaica where one has

²⁸ s7 Defamation Act 2013. Jamaica is the first country within the Commonwealth Caribbean to abolish criminal defamation.

²⁹ s33 of the Defamation Act.

already been brought against him in another jurisdiction in relation to the same defamatory publication.³⁰

Other provisions of the Act which the social media user may find ameliorate the extent of culpability which may arise as a result of the publication of defamatory comments which is globally accessible social media are those which address the issues of responsibility for the determination of liability and the assessment of the quantum of damages during a trial where the defendant has been found liable for defamation. Before the Act, commentators complained that the damages awarded were not commensurate with the harm suffered by the Claimant. It was opined that the damages awarded in defamation actions in Jamaica were excessive in comparison, for example, with the quantum of damages usually awarded for the loss of a limb. These exorbitant awards were attributed to the inexperience and lack of legal knowledge by the jury who were charged with the task of assessing the quantum of damages awarded which was further compounded by the complexity of the law of defamation and assessment of damages for legal practitioners and judges. Under s 17(3) of the Act, quantum of damages will now be assessed exclusively by the judge and the jury will only have the task of determining liability.

Unfortunately an aggrieved may still “easily” be able to establish a claim in defamation once they can prove the three elements of publication, defamatory statement about and concerning the aggrieved to a third party. Reasserting the pre-amendment position, the Act states that the statement is actionable without the aggrieved having to prove he even suffered any special damage.³¹ This is of particular concern to the social media user as the Act fails to take into consideration that certain statements published within a particular context and environment is intended “meaningless” conversation and frivolous comments. Therefore the social media publisher is not able to use as a defence that the publication via social media is of such circumstance that the aggrieved is unlikely to suffer any harm.³² This rule may serve to discourage social media users from expressing their freedom of expression right via social media in fear that the expressions may not be interpreted in the manner intended, for example in jest. The harshness of the no special damage rule may be lessened by the fact that under the new

³⁰ s18 of the Defamation Act.

³¹ s9 of the Defamation Act.

³² s19 (2) of the Defamation Act 2013.

Act the judge is now exclusively charged with responsibility of determining the quantum of damages to be awarded where liability was established and therefore may take into consideration evidence of the lack of special damage.

Social media users may have wished that the legislature had included, in the newly enacted Defamation Act, the defence of triviality especially in relation to content published via social media in jest. By this defence the defendant would be excused of liability where he can show that the aggrieved did not suffer any harm as a consequence of the publication of the defamatory statement. However, the Joint Select Committee expressed that triviality of the statement does not go to determining one's liability. The triviality of the statement should then be considered in determining the quantum of damages to be awarded.

The large cost and lengthy period of litigation associated with defending defamation cases was one of the factors which contributed to the chilling effect on the exercise of the right of freedom of expression. Social media users may feel less chilled in their expressions knowing that provision is made within this new legislation for resolving claims of defamation without having to embark upon costly court proceedings. The social media user may choose to avoid the lengthy court proceedings by offering to make amends by publishing a statement correcting the defamatory publication as well as by apologizing for the defamatory publication.³³ Some payment of a sum as compensation for damage may also be made at this juncture. However in order to exploit this option, the social media publisher must make the offer of amends before he serves his defence on the aggrieved claimant.³⁴

Additionally the Act provides that where one opts to make an offer of amends, correction and or compensation if that offer is not accepted by the claimant, the claimant may not use the fact of the offer as evidence of admittance of guilt.³⁵ The offer will considered to be made without prejudice.³⁶ Therefore should these gestures by the social media publisher not be accepted, it may not be used by the aggrieved against the social media publisher as an admission of liability. On the other hand, the publisher may use the fact that he made an offer to make amends as a plea

³³ ss12-15 Defamation Act 2013.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

in mitigation of damages where the court rules that he has defamed the claimant.³⁷

5.1 DEFENCES

Once an aggrieved party establishes a prima facie case of defamation the social media publisher will then have the task of establishing one of the defences available which permits him to exercise his right to free expression via social media in the manner that he did. The defences provided by the new Defamation Act which may be relied on by the social media user for their publications online are Truth, Fair Comment, Innocent Dissemination, and Qualified Privilege, each with its own set of requirements and qualifications.

The defence of Truth was formerly known as Justification. To rely on this defence, the social media publisher must adduce evidence to establish the accuracy of the statement. He must show that the substance of the allegedly defamatory matter is true or not materially different from the truth.³⁸ The defence will not be defeated where the matter in question contains aspersions that are not proved to be true and those untrue aspects do not materially injure the reputation of the claimant, having regard to those aspects of the material proved to be true.³⁹ Establishing the defence of truth may be a challenge for the social media user especially where he did not author or create the content but incurred liability as a republished because he shared, re-tweeted, rebroadcasted or forwarded the defamatory material.

The social media user can also rely on the defence of Fair Comment where he expresses an opinion based on true facts.⁴⁰ Again this defence may be limited in its usefulness to the social media defendant because of the limitations of the method of disseminating content via social media applications via social media. If the opinion is based on statements of fact which are not true or substantially true the defence will fail. For example publications via Twitter where the publisher is only able to use 140 characters the user is hardly able to state the relevant facts which are the basis of his opinion. They are worded more than likely as assertions of facts than opinions. The jury will have to make the determination if it is one or

³⁷ s13 Defamation Act 2013.

³⁸ s20 Defamation Act 2013.

³⁹ *Ibid.*

⁴⁰ s21 Defamation Act 2013.

the other, and whether the social media defendant may rely on the defence of fair comment.

The social media user may also seek to rely on the defence of Innocent Dissemination.⁴¹ This defence is available to persons who:

- i. merely acted in the capacity of a subordinate distributor to the publisher of the matter and/or*
- ii. can show that he did not know the matter was defamatory and that that lack of knowledge was not due to negligence on their part.*

In relation to the first prong of the defence, section 22 it does not expressly describe who is a subordinate distributor. What this does is to expressly state who will not be considered a subordinate distributor. According to s22 (4) a subordinate distributor is neither:

- (a) the first or primary distributor of the matter,*
- (b) the author or originator of the matter, or*
- (c) one who had some capacity to exercise editorial control over the content of the matter and the decision to publish the matter before it was first published.*

What is clear is that social media users who are authors or originators of the alleged defamatory content will not be able to fall within the s22 (1) (a) as a subordinate distributor who can rely on the defence, unless he is acting in the capacity of an employee.

For the second prong of the defence the social media users, must show that lack of knowledge of the defamatory publication was not due to negligence within the context of social media expressions. The Act does not include any provisions which outline what factors should be used to determine whether the social media user ought reasonably to have known that the content shared as a subordinate distributor was defamatory. Consequently, the Act allows the Jamaican courts a degree of latitude to determine what constitutes reasonableness based on the facts of each case.

The Act also provides the defence of qualified privilege to the social media user where he can show that the defamatory expression was a fair and accurate report of parliamentary, judicial proceedings and or decision

⁴¹ s22 Defamation Act 2013.

of a public authority and those circumstances set out in the First Schedule of the Act and the report was made without malice.⁴²

5.2 LIMITATION OF THE APPLICABILITY OF THE DEFAMATION ACT OF JAMAICA

The multi and cross jurisdictional nature of the social media which allows exercises of expression to be read or viewed virtually anywhere in the world by others effectively exposes the social media user to the possibility of claims of defamation being brought against them by claimants from within as well as outside of Jamaica. The Jamaican Defamation Act 2013 does not include a provision which states that the social media user who publishes from Jamaica will only be subjected to the defamation rules of Jamaica. The social media user must therefore be not only concerned with the domestic defamation laws of Jamaica, but must be aware that their expressions are also subject to the domestic defamation laws of other countries.

6. CONCLUSION

Social media has been embraced with open arms as a platform which advances and adds value to the exercise of the fundamental human right of freedom of expression. Its characteristics of easy, inexpensive and wide scale global accessibility have contributed to it becoming an integral part of modern day communications of the social media user. However, the very qualities of social media which are celebrated may also be good reason for its users to limit, chill, and temper its use as a platform for the exercise of their fundamental right of freedom of expression. While social media creates more opportunities to disseminate and receive information, it also creates an environment which facilitates the making and publication of defamatory content to a larger audience, across multiple jurisdictions, with greater ease than if publication was made via traditional means of communication. The fact that various types of content may be shared instantaneously, anonymously and from anywhere via social media has given users the false sense of security that they can do so without restraint, regard for the reputations of others or some degree of self censorship. The result is that social media users may fall in the trap created by the social media that they are free to express anything with impunity and then find

⁴² The list of qualified occasions is set out in Part I and II of the First Schedule of the Act.

themselves liable for defamatory publications in jurisdictions other than their own.

The newly enacted Defamation Act 2013 of Jamaica has included provisions which apply to expressions published via social media by its users. However the global nature of social media means that domestic laws will not provide any relief where the expression is found to be judged by the law of another country where the expression was accessed. The social media users may be safer if they are cautious in how they exercise and exploit their right to freedom of expression via the social media in order to limit this increased exposure to being sued for defamation globally.

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